

Dix Construction, Inc. and Massachusetts Laborers' Benefit Funds. Case 1-CA-27780

September 27, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

Upon a charge filed by the Massachusetts Laborers' Benefit Funds on November 8, 1990, the General Counsel of the National Labor Relations Board issued a complaint on December 17, 1990, against Dix Construction, Inc., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act. The Respondent has failed to file an answer.

On June 17, 1991, the General Counsel filed a Motion for Summary Judgment. On June 20, 1991, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint,¹ unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that counsel for the General Counsel, by letter dated April 9, 1991, notified the Respondent that unless an answer was received by April 16, 1991, a Motion for Summary Judgment would be filed.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

¹ Counsel for the General Counsel was unable to locate the return receipt for service of the complaint. In view of the Respondent's failure to assert that it did not receive the complaint and notice of hearing, or that its failure to respond was based on improper service, as well as evidence that the Respondent did receive all other documents such as the order scheduling hearing which was mailed after the complaint and notice of hearing and was acknowledged by return receipt, we find that counsel for the General Counsel's failure to produce the return receipt does not constitute a fatal defect in service. See generally *Electrical Workers IBEW Local 11 (Anco Electrical)*, 273 NLRB 183, 191 (1984).

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Massachusetts corporation, with an office and place of business in Brockton, Massachusetts, has been engaged as a cement finishing contractor in the construction industry. During the 12-month period preceding issuance of the complaint the Respondent provided services valued in excess of \$50,000 for employers who are themselves directly engaged in commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since December 17, 1986, the Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO has been the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All employees of the Respondent employed at its Brockton, Massachusetts facility, in the classifications set forth in the 1988-1991 agreement, excluding all other employees, guards and supervisors as defined in the Act.

The Associated General Contractors of Massachusetts, Inc. and Building Trades Employer's Association of Boston and Eastern Massachusetts, Inc., hereafter jointly called the Associations, are organizations composed of employers in the construction industry which represent their employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. On December 17, 1986, the Respondent executed an Acceptance of Agreement and Declaration of Trust with the Union by which it agreed to be bound by the 1985-1988 agreement and any successor agreements. On June 1, 1988, the Associations and the Union entered into an agreement effective June 1, 1988, through May 31, 1991.

The complaint alleges that since about June 20, 1990, the Respondent has failed and refused to remit to the Union dues under article VIII and fringe benefit payments which have become due since about June 20, 1990, under articles XI, XII, XIII, XIV, and XV of the 1988-1991 agreement as follows:

- (a) Health and Welfare Fund
- (b) Pension Fund
- (c) Training Trust Fund
- (d) Legal Services Fund
- (e) Annuity Fund

We find that the Respondent by such acts and conduct has failed and refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing to remit to the Union authorized dues and fringe benefit payments to the Health and Welfare Fund, Pension Fund, Training Trust Fund, Legal Services Fund, and Annuity Fund, which have become due under the collective-bargaining agreement since about June 20, 1990, the Respondent has failed and refused to bargain in good faith with the Union and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to remit to the Union authorized dues that have become due since June 20, 1990, as required by the collective-bargaining agreement, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). In addition, the Respondent shall remit to the Union the fringe benefit contributions to the Health and Welfare Fund, Pension Fund, Training Trust Fund, Legal Services Fund, and Annuity Fund which have become due since June 20, 1990, with any additional amounts applicable to those payments to be computed in accordance with the Board's decision in *Merryweather Optical Co.*, 240 NLRB 1213 (1979). The Respondent shall also reimburse its unit employees at the Brockton facility for any expenses resulting from its failure to make its contractually required fringe benefit remittances to the Union in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enf'd. 661 F.2d 940 (9th Cir. 1981).

ORDER

The National Labor Relations Board orders that the Respondent, Dix Construction, Inc., Brockton, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO, during the term of the collective-bargaining agreement by failing and refusing to remit to the Union authorized dues and fringe benefit payments to the Health and Welfare Fund, Pension Fund, Training Trust Fund, Legal Services Fund, and Annuity Fund that have become due since June 20, 1990.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contributions to the Health and Welfare Fund, Pension Fund, Training Trust Fund, Legal Services Fund, and Annuity Fund which have become due since June 20, 1990, as required by the collective-bargaining agreement, and remit all union authorized dues and make unit employees whole, as set forth in the remedy section of this decision. The appropriate unit is:

All employees of the Respondent in the classifications set forth in the 1988-1991 agreement, excluding all other employees, guards and supervisors as defined in the Act.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facility in Brockton, Massachusetts, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain in good faith with the Massachusetts Laborers' District Council of the Laborers' International Union of North America, AFL-CIO by failing and refusing to make contrac-

tually-required payments to the Health and Welfare Fund, Pension Fund, Training Trust Fund, Legal Services Fund, and Annuity Fund, as well as remitting authorized union dues to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contributions to the aforementioned funds and remit all authorized union dues with

interest that have become due since June 20, 1990, and we will make unit employees whole. The unit is:

All employees in the classifications set forth in the 1988–1991 agreement, excluding all other employees, guards and supervisors as defined in the Act.

DIX CONSTRUCTION, INC.